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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 805

WILLIAM FRASER, ET UX., Petitioners

VS.

P. M. BARTON, ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

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THE DAILY NEWS

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Received of Wils Davis, Solicitor for Petitioners Mr. and Mrs. William Fraser one copy of the Court Record, three copies of their Petition for Certiorari and Brief and Argument, together with notice of the filing of same, as required by the rules of the Supreme Court.

This the 28th day of December, 1944.

WILLIAM McCLANAHAN,

U. S. District Attorney.

.....

Memphis, Tennessee.

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VS.

P. M. BARTON, ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Petitioners, William Fraser, and wife, Mrs. William Fraser, or Katie Fraser, pray this Court for a writ of certiorari to review judgment of the United States Circuit Court of Appeals, for the Sixth Circuit, in consolidated causes there entitled, William Fraser vs United States; Mrs. William Fraser vs. United States; and P. M. Barton et al. vs. United States et al. R. pp. 975-976. In the United States District Court of Memphis, Tenn.,

P. M. Barton on behalf of himself and others sued William Fraser et al, and the United States intervened. R. pp. 3-9-10-20.

The opinion and judgment of the Circuit Court of Appeals, entered October 3, 1944 affirmed a judgment of the district court holding William Fraser and his partner, G. H. Britton, jointly and severally liable to the United States for $55,762.14, as penalty on 1,833 bales of cotton, purchased by them from the Three-Way Land Company, a corporation, of which P. M. Barton was president, on the ground that the cotton was grown by the seller in excess of allotment under the 1938 Agricultural Adjustment Act, as amended, 7 U.S.C.A. 1348. R. pp. 161-169. The judgment also allowed recovery against Fraser and Britton, of $12,971.00, balance of purchase price of this 1,833 bales, plus 20 bales not subject to penalty, in favor of P. M. Barton, and a number of tenants in whose behalf he had sued. R. p. 166.

FEDERAL STATUTES INVOLVED

7 U. S. C. A. 1348:

> "Any farmer who, while farm marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which such cotton was produced, shall be subject to the following penalties with respect to the excess so marketed; two cents per pound if marketed during the first marketing year, when farm marketing quotas are in effect; and three cents per pound if marketed during any subsequent year.——".

7 U. S. C. A. 1372:

> " (a) The penalty with respect to the marketing, by sale, of wheat, cotton or rice, if the sale is to any person within the United States, shall be collected by the buyer.
>
> (b) All penalties provided for in Sub-title B shall be collected and paid in such manner, at such times, and under such conditions, as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other person is liable for the collection of the penalty, such other person shall remit the penalty. ***."

Further, Section 9, of Joint Resolution relating to corn and wheat marketing quotas under the Agricultural Adjustment Act of 1938, as amended, No. 74, 77th Congress, May 26, 1941, provided:

> "The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941-42 marketing year) shall be at a rate equal to fifty per centum of the basic rate of the loan for cooperators for such marketing year under Section 302 of the Act, and this Resolution."

This was established as follows:

> " (10) The Commodity Credit Corporation is directed to make available upon the 1941—crops of the commodities cotton—for which producers have not disapproved marketing quotas for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:
>
> (c) To non-cooperators—at the rate of sixty

percentum of the rate specified in (a) above, and only on so much of the commodity as would be subject to penalty if marketed." 7 U. S. C. A. 1340.

Pursuant to the above paragraph or Section (9), the Secretary of Agriculture, by regulation, established the rate of penalty for the 1941-1942 excess marketed, at 7c. per pound. R. p. 719. It was on this basis that the amount of the judgment was determined. The cotton was grown in the 1941-42 season.

SUMMARY STATEMENT OF THE MATTER INVOLVED

William Fraser and G. H. Britton were partners, engaged in the cotton business in Memphis, under the firm name of G. H. Britton Cotton Company, and in April, 1942, contacted the Three-Way Land Company, a corporation, at Catron, Missouri, through its president, P. M. Barton, offering to sell for that company its snap cotton, on which it then had a loan with the Mid-South Cotton Growers Association in Memphis.

By letter of April 2, 1942, the Memphis Company made an offer to the Missouri Company to try to sell its cotton for it at 15 1/2c. a pound. R. pp. 569 and 570. This offer was declined and all negotiations terminated by letter of April 6, 1942, from the Missouri Company to the Memphis Company. R. p. 572.

However, about April 20, 1942, samples of the cotton were delivered to the Memphis Company, and negotiations were reopened, but the Memphis Company stated in its letter acknowledging receipt of these sam-

ples, "*We cannot tell about what the cotton will bring at this stage of our work.*" R. p. 574.

So up to this time no contract had been attained between the parties, though both the courts have based their holdings on the theory that the letter of April 2, 1942, was the contract. R. pp. 944, 945, 977 and 978.

On April 24, 1942, William Fraser, for his Company, sought and obtained an option on 3,000 bales of the cotton, as evidenced by a letter of confirmation, from G. H. Britton Cotton Company to the Three Way Land Company, dated April 24, 1942, from which we quote:

> "Will confirm option given us today on 3000 bales your snap cotton at $7 per bale above loan value, good until Tuesday, April 28th. With the privilege of taking 1,000 bales and/or 2,000 bales and/or 3,000 bales.
>
> *We are not interested in any Government tax.*" R. p. 481.

* * * * *

Barton first testified that "above loan value" meant above the loan to the Mid-South, and above the penalty or tax. R. pp. 564-565. But Barton later admits it meant simply above the outstanding loan (R. pp. 671-675), and then stated that he did not know what was meant by "above loan value," in the above quoted letter. R. p. 675. We quote the latter:

> Q. What he meant by "above loan value," was the amount that had been borrowed on the cotton?
>
> A. I don't know what he meant?. R. p. 675.

Anyway, seasonable objections to the admissibility of such oral testimony in variance of the written contract were made. R pp. 567 and 569.

Both Fraser, and his bookkeeper, who heard the telephone conversation, testify in confirmation of the written contract, that Barton's company was to pay the Government tax. R. pp. 485, 486, 705 and 735.

The above quoted letter of April 24, 1942, was the basis for all purchases which ensued. We quote briefly from the several letters confirming orders:

Apr. 27, 1942 "1,000 bales your snap cotton at $7 per bale above loan value." R. p. 484.

May 5, 1942: "400 bales your cotton at $8 net per bale above 1941 loan value." R. p. 581.

May 8, 1942: "100 bales snaps at $7 per bale net to you." R. p. 582.

May 11, 1942: "200 bales of cotton at $7 per bale above loan value net to you." R. p. 582.

May 14, 1942: "100 b/c at $7 net above loan value 125 b/c at $6 above loan value." R. pp. 492, 583.

May 18, 1942: "450 bales at $6 per bale above loan value." R. p. 647.

There were no other sales than the above. 2375 bales were ordered; only 1853 delivered R. pp. 3-9. Cross-bill was filed for failure to deliver the deficiency, 522 bales. R. p. 73.

G. H. Britton Cotton Company sold the cotton deliv-

ered, and were preparing checks for remittance to Three-Way Land Company, when Barton enticed Fraser to Catron, Missouri, where Barton filed suit against Fraser, and his partner, Britton, suing in the name of the Three-Way Land Company, only. R. pp. 197-201, 332 and 333.

When this happened, naturally Fraser and his firm discontinued remittances to the Three-Way Land Company. R. p. 335.

Afterwards, in November, 1942, P. M. Barton instituted the instant action by a suit in the United States District Court at Memphis, suing in his own name, and in behalf of the Three-Way Land Company, and also suing in behalf of some 62 sharecroppers. R. pp. 3-9 and 17. The complaint alleged these sharecroppers owned three-fourths interest in the cotton, and claimed that Fraser's firm had sold the cotton for the owners, and should account for the proceeds, pay the government tax, and pay the balance due to the owners, avering the letter of April 2, 1942, to be the contract. R. pp. 3-9.

It is noted that while the complaint alleges defendants took the cotton as selling agents, this theory is later abandoned, and instead plaintiffs concede it was an outright sale. R. pp. 537 and 584.

December 3, 1942, the United States filed its intervening petition, making all prior parties, defendants, suing them all for its tax or penalties on the cotton. R. pp. 10-20. Without securing an attachment, the suit sought by use of injunctions to restrain Fraser and his wife, from entering certain safety deposit boxes. Quite a big to-do was made about this, and the boxes were opened and nothing found therein. R. pp. 10-22 and 80.

Then the Government's attorney, conceiving that Federal Rule of Civil Procedure No. 26, provided the equivalent of a chancery bill of discovery, subpoenaed Fraser to testify, under said rule. R. pp. 28 and 30. Motion by Fraser to vacate this subpoena was overruled, and Fraser's deposition was taken, Dec. 15, 1942. R. pp. 28-30, 44-51 and 323.

As certain Tennessee statutes are involved at this juncture, we quote the same for the convenience of the Court:

CHANCERY BILL OF DISCOVERY

1932 Tenn. Code, Sec. 10353:

> "*The creditor whose execution has been returned unsatisfied,* in whole or in part, may file a bill in Chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held in trust for him, except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by Will duly recorded or deed duly registered."

TESTIMONY OF HUSBAND OR WIFE

Tenn. Code, Sec. 9777:

> "In all civil actions, no person shall be incompetent to testify because he is a party to, or interested in, the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, *though*

> *neither husband nor wife, shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation.*"

FEDERAL CIVIL PROCEDURE RULE No. 26.

This rule provides for the taking of depositions, pending an action, and in its first section, (a), provides among other things that depositions may be taken, "for the purpose of discovery," as a means of enabling a party to establish his case.

Its second section limits the scope of examination:

> "(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, *not privileged*, which is relevant—"

Now what happened was this, that the Government's attorney, in seeking collection of the tax, instead of bringing a simple suit against the Three-Way Land Company, a perfectly solvent corporation primarily liable as grower and first purchaser, as stated conceived that the phrase "for the purpose of discovery" found in Federal Civil Procedure Rule No. 26, is the equivalent of the provisions for a discovery of property made in the Tennessee Chancery Statute available to a judgment creditor; and, though no one at the time had a judgment, and issues had not been joined, the Government proceeds as if it were in the role of a judgment creditor, using process available only after a judgment is secured. In this way Fraser is put on the witness stand and plied with questions as to the whereabouts of monies, and compelled to answer by mandatory order of the court. R. p. 55.

The witness himself, expressly claimed the benefit of the privilege provided by the Tennessee statute, that his answer would involve confidential communications between himself and his wife. R. pp. 370, 373, 379, 382, 384, 385, 387, 388, 396 and 402. Despite this he was required to answer. R. p. 55.

The witness, thus under constraint of the court, answered that he had delivered the monies to his wife. Whereupon the taking of his deposition was abruptly suspended, and the Marshal sent with an instanter subpoena for Mrs. Fraser, who was brought into court thirty-five minutes later (R. pp. 394 and 395), and required to testify, over objections by Fraser, and without opportunity to consult counsel, or to be advised of her rights (R. pp. 396, 397, 400-402), and was questioned about matters and transactions between her husband and herself. (R. pp. 403 and 404), and testified that she had monies on her person. Whereupon, she was hailed before the court and required to turn the monies over to the clerk of the Court, and she thus surrendered possession of $27,000.00 in cash, and $2500 in Government bonds. All this being done over the vigorous objections of Fraser. R. pp. 409, 411, 412, 416, 419, 420 and 423.

These funds were by the judgment of the court applied to the discharge, pro tanto, of the Government's judgment for the penalties. R. p. 159.

The district court found as facts that the contract was in the alternative, that Barton was to receive either $7 a bale, after payment of the loan, and the tax, or to receive 15 1/2c a pound, and the tax money to be put in escrow; that the Three-Way Land Company was dis-

solved as a corporation on July 27, 1942, and P. M. Barton, R. L. Taylor and H. Highfill owned the assets, and as such, owned one-third interest each in one-fourth of the cotton, the other three-fourths of the cotton being owned by the 62 sharecroppers. That G. H. Britton Cotton Company had sold the cotton and received the money therefor, and owed all the plaintiffs, including the sharecroppers, $12,971.00, being $7 a bale on the 1853 bales; and that all the parties, the plaintiffs, and Britton and Fraser jointly and severally owed the Government the tax, $55,762.14, and that the monies and funds in the hands of the clerk, including that taken from Mrs. Fraser should be applied to the judgment. The cross-bill of Britton and Fraser for failure to complete delivery of the other 522 bales, was dismissed. R. pp. 146-169.

Though errors were assigned and partially conceded in the Circuit Court of Appeals, that court affirmed the judgment of the district court, refusing to disturb its judgment for recovery, and to return the funds taken from Mrs. Fraser. Mrs. Fraser had intervened in a petition seeking the return of the monies taken from her. R. pp. 979, 987, 114.

Designation of errors by Fraser and Mrs. Fraser. R. pp. 179, 187.

STIPULATION OF FACTS

We here quote paragraph 2 of the stipulation of facts filed in the cause:

> "That the cotton involved in this suit, to-wit, 1853 bales aggregating 805,387 pounds was grown, produced and marketed from and on lands owned,

> farmed and operated by the original plaintiffs in this cause, the amount of cotton owned by each individual plaintiff and the tabulation of their respective interest therein being set out in instruments attached hereto and marked exhibits 'A' and 'B', which are to be considered a part hereof; *that defendants, Wm. Fraser and G. H. Britton did not know nor deal with any of the plaintiffs except P. M. Barton and the Three-Way Land Company, who assumed to be the owners, did offer to sell or consign, and did deliver said cotton to the defendants, Wm. Fraser and G. H. Britton.*" R. p. 106 Par. II.

In the original complaint, in the case entitled P. M. Barton et al. vs. United States of America, the record shows this suit was filed only against G. H. Britton Cotton Company, and Fraser and Britton, and was filed only by P. M. Barton, as the plaintiff, and that P. M. Barton merely sued in behalf of the other so-called plaintiffs, including the 62 sharecroppers. R. pp. 3, 9, 17.

This is also shown by the Findings of Fact, paragraph I, where it is recited that:

> "P. M. Barton, individually, and the other parties *in whose behalf* he institutes this suit———." R. p. 147.

There was, thus, only one plaintiff in this action, to-wit, P. M. Barton; and this is true, though he sues as an individual, and as a representative, in behalf of others.

The judgment of the court, however, does not fit the complaint, but makes its recovery against Britton and Fraser to run in favor of the severally named sharecroppers, and stockholders of a dissolved corporation, with none of whom Britton and Fraser had any contract whatever. R. pp. 161, 169, 106, Par. II.

Britton and Fraser bought from a solvent corporation, and are confronted with a suit in behalf of a host of individuals, mostly worthless sharecroppers, of whom they had never heard before. There was purpose in this distortion.

At least they had a right to look to the Solvent Agent, so called, Three-Way Land Company, with whom they contracted:

JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the district court was based on diversity of citizenship, P. M. Barton, and those for whom he sued being non-residents of Tennessee, Fraser and Britton being residents of Tennessee. R. pp. 3 and 4.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28. U.S.C.A. 347, (a) as amended.

SPECIFICATION OF ERRORS AND REASONS FOR GRANTING CERTIORARI

Your petitioners respectfully submit that the Circuit Court of Appeals was in error in the following respects:

I.

The Court erred in sustaining a judgment against Britton and Fraser in favor of numerous individuals who were not plaintiffs in the action, nor parties to the contracts, but were merly persons in whose behalf Barton had

sued; and in holding that Barton was the proper party plaintiff, and in not holding that the Three-Way Land Company, a corporation, was the only proper plaintiff. Authorities, supra. Op. R. p. 978.

This was error because:

1. Britton and Fraser purchased the cotton from the corporation, and knew no one else in the deal. R. p. 106, Par. II.

2. P. M. Barton had full authority as president, and as one of the liquidating agents of the corporation, to sell the cotton, and to sue on the contract of sale in the name of the corporation. R. p. 591.

3. He first sued in that way in the Missouri Court, but adopted other tactics in the instant case for obvious reasons.

4. The corporation, as plaintiff, would have, and should have, suffered an estoppel by reason of the fact that in Missouri it alleged the letter of April 24th was the contract, and that the corporation was the owner, whereas, the suit in Memphis alleged that the letter of April 2nd, was the contract, and a large number of share-croppers, the owners.

Johnson v. R. R. Co., 146 Tenn., 135 pp. 159 and 160, 240 SW. 429.

II.

The Court erred in not holding that the letter of April 24, 1942, and the succeeding letters ordering cotton, plainly and unequivocally meant that the buyers of the cotton,

G. H. Britton Cotton Company, were not to pay the Government tax, but would definitely pay $7 a bale above loan value, leaving the tax to be paid by the seller, and erred in permitting oral testimony to be used to contradict these writings which constituted the written terms of the definite contract of sale and purchase. Op. R. pp. 977-978.

This was error because:

1. The admission of the oral testimony permits a vital change in the written terms of the contract, in that the phrase "above loan value", is to be made to read, "above loan value plus the Government tax."

2. The basis of the reasoning of the learned court is that without this amendment the purchasers of the cotton would reap a profit of $46,000. This falls because if the amendment is made, and purchasers must bear the tax, $55,762.14, they deliberately traded themselves into a loss of $9,762.14.

3. It is more plausible that the Three-Way Land Co., the corporation had acquired the cotton by purchase, and had become aware of its own primary liability for the collection of the tax, as first purchaser, and was in a mood to get rid of the cotton on any terms.

III

The Court erred in holding that Fraser and Britton were liable, along with others, for the payment of the Government tax, or penalty. Op. R. p. 979.

This was error because:

1. The Court based this holding on the theory that

Fraser withheld the amount of the penalty from Barton and from the Government, and so, in effect, collected it. This theory does not hold because Fraser and Britton did not collect, nor intend to collect any tax, or money for such, but simply bought of a good and solvent seller cotton at a definite price, $7 a bale, assuming, naturally, that such a solvent seller had in acquiring the cotton made its own provisions about the satisfaction of any penalty and so stipulated in their letter of April 24th.

2. The holding is further based on the theory that Britton and Fraser bought non-quota cotton with notice. The facts are they simply bought cotton and had no notice they were to be in the role of first purchasers obligated under statutes to collect a tax for the Government.

3. In fact, the Three-Way Land Company, the seller corporation, was in the role of first purchaser from the growers and was, itself, solely, responsible for the collection and remission of the penalty, and probably had been derelict in this duty for many months. It had always, theretofore, sold cotton and paid the penalties. R. pp. 612-614 and 671.

4. No obligation rests upon a second, or other subsequent purchaser to see to it that a Government tax has been paid, or collected, or remitted. The penalty does not follow the transactions in cotton after it gets on the market, nor beyond the first purchaser.

5. May we not see here purpose and design on the part of this seller corporation, when we note that in Missouri it sued in its own name and on the basis of the letter of April 24, while in Memphis, in the instant suit, it not only changes the basis of suit to a letter of April 2,

but also remains in the background as party plaintiff, and has suit brought in behalf of a host of sharecroppers? This was to hide the fact of the corporation being the first purchaser.

6. If this corporation be not the owner as it first averred and as apparently it is, it held itself out as such, and Fraser and Britton are entitled to look to it for protection and performance as the agent of an undisclosed principal.

Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. p. 665;
Echols & Co. v. Strachan Shipping Co., 21 Fed. (2d) 653, 654;
Riley v. Bondi (8th C.C.A.) 64 Fed. (2d) 515;
Pickands, Mather & Co. v. Kuhn & Co., (6th C.C.A.) 8 Fed. (2d) 704.

IV

The Court erred in refusing to give effect to the Tennessee Statute which provides:

> "Neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." Tenn. Code 9777.

In that, the Court failed to exclude all testimony extracted from Fraser, and from his wife, about the funds, and failed to order the return of the funds taken from the person of Mrs. Fraser, and failed to sustain the errors assigned on the action of the trial court in overruling motion for exclusion of testimony and return of funds.

As to taking of funds, R. pp. 370-423.
Motion for return, R. pp. 114, 121.

Overruled by trial court, R. pp. 531, 535.
Errors assigned, R. pp. 179, 181.

This was error because:

1. The Court in its opinion held, that, while the law extended to both utterances and acts between husband and wife in Tennessee, in some jurisdictions, outside of Tennessee, there were decisions that the rule of exclusion did not apply where the husband was acting in furtherance of a fraud; and the court, while stating that there was no Tennessee decision to this effect, believed that public policy warranted such an exception in Tennessee when communications and acts of the husband were in furtherance of a fraud, particularly when Government revenue was involved. R. pp. 983, 984.

This view is erroneous because, the Tennessee statute and Tennessee decisions are plain and specific and warrant no such exception as has been engrafted thereon in the above view.

Government revenue is not sacrosanct, but if and when its collection needs special arrangements federal statutes provide such and it does not remain for federal courts to amend state statutes by construction to give the government a special advantage.

The aura of fraud about this record is wholly synthetic and a work of art. G. H. Britton Cotton Company, and its two partners, Britton and Fraser, simply stood stock still when Barton turned loose his guns of litigation, first in Missouri and then in Memphis, and held the funds (R. p. 335). This is not fraud, nor does it even suggest fraud.

Testimony of G. H. Britton:

"Q. What was your purpose in turning this money over to Mr. Fraser—this $29,500?

A. I understood that Mr. Fraser was to hold that money until the outcome of the suit with Mr. Barton, or until some definite settlement was made." R. 437.

2. The Court in its opinion does cite a Tennessee case holding that a wife, while unable to testify to receipt from the husband, was permitted to avow her possession of the article, a deed. R. p. 983.

But a deed may bear intrinsic evidence of its source and significance, but this is not true of money. So, if the Court has taken money from Mrs. Fraser, and is barred from knowing where that money came from, then the court would be put in the brutal act of taking money from a person without knowing why, or whose it was.

3. Then the learned court takes the view that it is not restricted by the rule of Erie R. R. vs. Tomkins, 304 U. S., 64, because the matter involved was one of remedial procedure under the equity powers of the court. R. p. 984.

No. The procedure was specifically under Federal Rule of Civil Procedure, No. 26, which rule itself expressly excepts matters that are privileged. On questions of privileged communications federal courts follow the law of the state of forum. Munzer vs. Swedish Am. Lines, (D. C. N.Y.,) 1940, 35 Fed. Suppl. 493; Wolfle v. U. S., 291 U. S. 7, 14, 78 L. Ed. 617, 620.

4. The Court then holds that Fraser, the communicat-

ing spouse, waived his rights to the protection of the rule, in that he did not stand his ground, refuse to answer, become contumacious, and seek relief from punishment for contempt by appeal or habeas corpus. R. pp. 984-985.

This view rather astounds us. We feel that it should be passed on by the highest court in the land, before it is accepted. Must a litigant deliberately get into contempt of a court in order to gain his rights, or protect his rights? Contempt of court is bad. It is not distressing—not when it is infrequent, as it now happens to be. But if the day ever should come when contempt of court should be prevalent and widespread, then we may fear for the very foundations of our society. We submit it is sheer folly to invite the practice of contemning the courts, or to prescribe it as a condition for the protection of rights in court.

The proper practice being submission and appeal from Adverse Rulings:

Crane vs. Hall, 141 Tenn., 563, 213 S.W., 414;
Cavert vs. State, 158 Tenn., pp. 542 and 543, 14 S.W. (2nd) 735;
Wolfle vs. U.S., 291 U.S. 7, 14, 78 L. Ed. 617, 620;
New York Life Ins. Co. vs. Ross (6th C.C.A.) 30 Fed. (2nd) 80, 89.

5. The Court then takes the final view that, even though there was error in requiring the disclosure, yet the disclosure once made is irrevocable, and is public property and may not be recalled; that this disclosure reveals that Fraser got the avails of the cotton, gave same to his wife to conceal; that it would be inequitable to return these funds, as they would be further concealed; and

the court compares the funds to seized liquors, and points out that while the search and seizure of the liquors might have been unlawful, all that is to be done is to exclude the testimony, but not return the seized liquors. Thus the learned court would keep the funds, despite the error. R. pp. 985-986.

Such a view is cold comfort to a citizen suffering a violated right. Its doctrine is—violate rights and you may keep what you find.

Seized liquors are not like monies. Liquors possessed by a person bear intrinsic evidence of illegality. Not so, with monies, about the possession of which there is nothing illegal. The learned court seems unable to do what juries are often called on to do, that is, forget and not use, testimony which has been excluded as incompetent. If courts expect juries to do that, certainly the courts should practice what they prescribe. If the learned court had simply laid aside from its thinking all the knowledge it had gained from the illegally admitted evidence about the monies, then it would have found itself in possession of monies which had been taken off a person without knowledge as to where the funds came from, or whose they were—in which situation nothing short of the return of the funds to the person from whom they were taken can relieve the court from the role of a bully. A court of equity must do equity, and it cannot be inequitable to reconstruct for parties their invaded rights, and restore a status quo, whatever the chagrin.

REASONS RELIED ON FOR REQUESTING WRIT

We feel that we have stated ample reasons along with

the errors specified, and do not desire to lengthen this Petition, but believe that this case involves some important questions of law, among these being:

1. The application of the rule in Erie Railroad Co. vs. Tomkins, 304 U. S., 64, 82 L. Ed., 1188, 1194.

2. The application of the Tennessee privilege statute so as to give it real effect, in conformity with the previous holdings of this Court.

3. Recognition of generally established rules of evidence and law, as to the variation or nullification of written contracts by parole testimony, and the merger of preliminary negotiations into such agreements.

4. Application of the general law that a party to a contract with an agent for an undisclosed principal (if the sharecroppers be principals at all) is entitled to hold the solvent agent, in this case The Three-Way Land Company.

5. The application of the doctrine of estoppel so as to prevent the practice of playing fast and loose with the Courts, by changing both bases of suit and parties, for patent improper advantages.

6. The right of citizens to make private contracts with reference to the payment of penalties or obligations imposed by statute, particularly where those assuming the burden are amply able to protect and hold harmless.

7. Recognition of the prohibition by Amendment Four to the Constitution of the abuse of the process of search and seizure.

8. And the application of the doctrine that information illegally or improperly obtained cannot be used.

9. That the ordinary processes of law cannot be cast aside merely for the sake of the adoption of unusual or extraordinary methods.

10. That the Congress has not enacted any attachment, garnishment, discovery or execution laws, but that the Federal Courts are dependent on State Statutes, for these processes.

28 U. S. C. A., Sec. 726, 727.

11. The principle of discovery, for the purpose of seizure or confiscation is only applicable after exhaustion of ordinary final process, execution, etc.

PRAYER FOR THE WRIT

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Court to the Honorable Circuit Court of Appeals, requiring said court to certify and file in this Court on a day certain, to be designated, a certified transcript of the consolidated cases there entitled, William Fraser vs. United States; Mrs. William Fraser vs. United States: and P. M. Barton et al. vs. United States, Nos. 9639, 9640 and 9641, to the end that said consolidated causes may be reviewed and determined by this Court, and that petitioners may have such relief as this Court may deem proper and just, and that the opinion and judgment of the said Circuit Court of Appeals and the District Court may be reversed and corrected, and all proper relief granted.

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BRIEF AND ARGUMENT

Opinion and Findings of Facts of Lower Courts

We most respectfully submit that the actual premises of the Opinion of the Honorable Court of Appeals, as well as the Findings of Facts of the District Court, is erroneous in many respects, which we believe led to its improper disposition of the cause.

We, therefore, beg leave to point out a number of these, taking them in order:

> 1. " * * * the Three-Way Land Company * * * in 1941, leased some 15,000 acres, planted to cotton, on a sharecropper basis." R. p. 977.

Mr. Barton, himself, President of the Three-Way Land Company, says this Company owned—not leased—about this quantity of cotton lands. R. pp. 555 and 616. In the dissolution or division of its assets, he received better than 4,000 acres as his one-third share. R. p. 676. The Company produced over 30,000 bales of cotton in 1941.

Moreover, the very fact that it had on hand over 3,000 bales of snap cotton, which is the lowest grade of cotton known to the trade, always the last gathered, (R. p. 731), further establishes the acreage to have been substantially in excess of 30,000 acres. To have ten per cent snaps is about average. These facts alone make it evident that the Company was also leasing or renting at least 15,000 acres more, for, a bale to the acre is an unusually large production of cotton. Mr. Fraser estimates the acreage planted as being near 50,000 acres. R. p. 372.

This, in all probability is more nearly correct, as the annual Government Crop Reports show for the cotton belt an average of less than one-half bale per acre.

Besides, this Company owned gins, live stock, farming equipment and other extensive assets, of all of which Mr. Barton was in control and general manager. R. pp. 554 and 555. He was a thoroughly experienced cotton dealer and buyer himself. R. p. 554.

These accomplishments make it certain that he was fully conversant in business affairs, particularly in the field or business in which he was dealing with Fraser, or the Britton Cotton Company, and amply able to take care of himself. There is nothing in this record to indicate any fraud or overreaching on the part of Fraser. None is charged in the pleadings. R. pp. 1-19.

> 2. "* * * There was evidence that Fraser proposed to sell the cotton at a price sufficient to enable him to pay Barton 15 1/2 cents a pound, or an average of $7 a bale 'above loan values', and that Barton understood this to mean that it would be net to him after payment of all Government claims. This understanding was confirmed in later letters between the parties * * *." R. pp. 977 and 978.

We again humbly urge there are no such letters. The only letters referring to the price to be paid are the confirmations enumerated in the Petition for Certiorari, page 8, supra.

In fact, there is but one communication using this figure—15 1/2 cents per pound—this being the one of April 2nd, (R. pp. 569 and 570), at which time Fraser had never seen a sample of the cotton. R. pp. 330 and 333. On re-

ceipt of the first of these (R. pp. 329 and 730), Fraser, or the Britton Cotton Company, promptly advised:

> "We cannot tell about what the cotton will bring at this stage of our work." R. p. 574.

The first offer to buy the cotton was at a stipulated price of "$7 per bale above loan value." R. p. 481.

In this letter, it was expressly provided, after oral agreement to the same effect (R. pp. 330 and 331):

"We are not interested in any Government tax." Which could only mean—"you are to take care of this, or this is your obligation." It could have had no other meaning.

But, if extrinsic proof is to be considered, this is conclusive to the same effect, for, both Mr. Fraser and Mr. Shaw, the latter a wholly disinterested witness, say this phrase was thoroughly defined to Mr. Barton to mean the "actual loan outstanding against the cotton, and his Company was to pay the penalty." R. pp. 330, 331, 485, 486, 735 and 705-707.

To this Mr. Barton first agrees, then says he does not know its purport. R. pp. 671-675. But, he delivered the cotton on these letters. R. p. 675.

This leaves all three, the written contract—the letter—Fraser and Shaw, uncontradicted as to the literal agreement.

So, there was neither evidence that Fraser *proposed* to sell the cotton at a price " * * * of 15 1/2 cents a pound or $7 a bale 'above loan values' * * * after pay-

ment of all Government claims." Nor was "this understanding confirmed in later letters between the parties."

In reality, exactly opposites are the facts.

> 3. "Fraser's interpretation of the agreement would have enabled him to make a profit of $46,000, while Barton and the farmers received less than $20,000. * * *." R. p. 978.

It is difficult to ascertain the bases of the Court's calculations here.

But, may we demonstrate the converse by accurate figures, that is, what Fraser, or the Cotton Company, would have lost on the bases set up,—"$7 a bale 'above loan values' * * * net * * * after payment of all Government claims".

It is stipulated that 1,833 bales of this cotton was subject to the penalty, these weighed 796,602 pounds, which gives an average weight of 434 pounds per bale; further, that there was outstanding on this 1,833 bales, a loan of $64,140.18, which equals $35.00 per bale, or 8.06 cents per pound. R. pp. 107 and 108.

The penalty is 7 cents per pound. So, these two items total 15.06 cents per pound.

To this must be added 25 cents per bale for taking it out of the loan (R. p. 488); also sampling of 28 cents per bale (R. p. 504); 90 cents per bale storage (15 cents per month); $1.00 per bale brokerage for selling and $7.00 per bale to the Three-Way Land Company for its equity, or a total of $9.43 per bale, to say nothing of Fraser or Britton Cotton Company's operating expenses,

that is, traveling expenses, telephone calls, telegrams, office overhead—bookkeepers, stenographers, rents, etc.—and they ought to be entitled to living expenses while they handle it, requiring a maximum of another $1.00 per bale—or a grand total of $10.43 per bale.

This divided by the weight, 434 pounds, gives 2.4 cents per pound additional, or a final total of 17.46 cents per pound, necessary to pay what the Lower Courts say the contract was.

Now, the record does not disclose what Fraser and Britton got for the Barton cotton, but it does show what a similar cotton brought, that is, the Leftwich or Ellis Edwards cotton. R. p. 290.

Hence, if we determine the average price of this cotton, we will have, at least substantially, the price at which the Barton cotton was sold.

The weight of 139 b/c bringing $7,366.47, at 12.25 equals 60,134 pounds. R. p. 284.

The weight of 131 b/c bringing $8,927.75, at 14.10 equals 63,317 pounds. R. pp. 281, 228 and 290.

The weight of 15 b/c bringing $1,076.31, at 15.25 equals 7,057 pounds. R. p. 287.

The weight of 4 b/c bringing $220.54 at 13.35 equals 1,652 pounds. R. p. 282.

The weight of 2 b/c bringing $110.26 at 14.65 equals 752 pounds. R. p. 282.

These last two items cover the six bales which brought $330.80. R. p. 282.

Therefore, we have the total weight of 132,972 pounds

for the 291 bales sold through Leftwich for $17,701.33, which gives us an average price of 13.32 cents per pound.

Hence, the difference between this price and the one set up by the Court of 17.46 cents per pound equals 4.14 cents per pound loss to Fraser or the Britton Cotton Company. On this basis, 796,602 pounds, the amount subject to penalty, that its, 1,833 bales, gives an actual loss, not counting any profit or pay for handling, of $32,975.32, resulting to Fraser or the Cotton Company on the basis fixed by the Lower Courts.

So, either dilema of the horn we take, it looks like, at least, one of these thoroughly experienced businessmen, Barton or Fraser, made a foolish contract.

Now, if the Court is going to permit a departure from the contract reduced to writing, accepted and performed by the parties, themselves, then we urge that the loss equitably belongs on Barton, or his disclosed principal, the Three-Way Land Company, for the reason that this incongruity results solely as a consequence of his over optomistism as to winning the suit, contesting the constitutionality of the Act, then being maintained by him and approximately 150 other farmers (R. pp. 614 and 615) in the United States District Court at Cape Girardeau, Missouri. Mr. Fraser says that Mr. Barton was confident of winning this suit, when he sold the cotton and this was one of the reasons why Barton or the Three-Way Land Company, for whom he was acting, assumed and agreed to pay the tax or penalty thereon. R. p. 483.

This gives a sensible and logical reason for the actions of the parties in making what may appear to be, on its face, an unusual contract.

Therefore, the Three-Way Land Company should be required to take the loss resulting from its own mistake, and it is patently wrong to visit this upon Fraser, as the Lower Courts have done.

That the Three-Way Land Company was to assume and pay this tax is made certain by other undisputed facts.

Mr. Barton, himself, says that he had sold, theretofore, from year to year, thousands of bales of cotton which was subject to penalty but which was never deducted from his sales by any cotton buyer, but these were all paid by him, or his company, in every instance. R. pp. 612-614 and 671.

These two facts make the trade sensible on the part of both parties, and is in conformity with the long established practice of the Three-Way Land Company, and confirms the oral and written contract (the letter of April 24th, excluding the penalty or tax), to the effect that Fraser or the Cotton Company was not to be responsible for the tax.

> 4. "The Corporation has surrendered its charter and given Barton the authority to liquidate and wind up its affairs." R. p. 978.

The resolution dissolving the Corporation expressly provides that *all* the officers of the Corporation shall perform this service, and not Barton alone (R. p. 591), as held by the lower courts.

Of course, the officers and stockholders, P. M. Barton, H. Highfill, R. L. and W. L. Taylor, upon dissolu-

tion and receipt of the corporate assets (R. p. 616) became actual parties to its contracts and obligations.

Parties to a contract are always necessary to the cause.

Nashville & D. R. Co., vs. Orr, 85 U. S., 471, 21 L. Ed., 810;
Payne vs. Hook, 74 U. S., 425, 19 L. Ed., 260;

An application to make them parties was refused. R. pp. 122, 123, 521, 529 and 530.

Therefore, the judgment rendered against them herein is absolutely void.

5. Estoppel—The Missouri suit in the name of Three Way Land Company, is based on the letter of April 24th, while the suit here is rested on letter of April 2nd. The District Court found reference to the April 24th letter in Missouri suit was error in drafting—the Court of Appeals says the "evidence to support this finding is meager", but sanctioned this apparent error, because "there being no showing of willful misstatement, and none of prejudice there is no estoppel." R. p. 978.

The reason for this "sanction" is clearly erroneous. For, the contract was made solely with the Three-Way Land Company, (R. p. 106, Par. II) a thoroughly solvent and enormously wealthy corporation, which was amply able to perform its contract and hold Fraser and the Cotton Company harmless, he (Frazer) is now held jointly and severally liable with sixty-two sharecroppers who are worthless, and whom it is now held were the undisclosed principles in the contract. R. pp. 161, 169. This is certainly prejudicial.

The Corporation willfully misstates the facts when it alleged it was the owner of the cotton in that cause.

AGENT BOUND WHERE PRINCIPAL UNDISCLOSED

Fraser and the Cotton Company are entitled to litigate their rights and hold this corporation solely and personally responsible, because of its failure to disclose its principal, for whom it was acting as agent.

Metcalf vs Williams, 104 U. S., 93, 26 L. Ed., p. 665;

Echols & Co. vs. Strachen Shipping Company, 21 Fed. (2d) 653, 654;
Riley vs. Bondi, (8th C.C.A.) 64 Fed. (2d), 515.

Hence, the original Plaintiffs in this cause are estopped to maintain this suit on a different contract or basis to that alleged, and with different parties to those in the Missouri cause.

Johnson vs. R.R. Co., 146 Tenn., 135, (pp. 159 and 160) 240 SW. 429.

RIGHT OF PRIVATE CONTRACT FOR RELEASE FROM PENALTIES

6. "The Court held both parties liable and we agree. Fraser withheld both from Barton and United States the amount of penalty and, so in effect, collected it." R. p. 979.

This is based on the fact that neither Barton, or the Three-Way Land Company, nor Fraser, or the Cotton Company, reported the transactions in cotton subject to penalty. R. p. 979. Frazer has from the beginning

admitted that he and the Cotton Company were secondarily liable. R. pp. 65, 354 and 355.

But, has insisted and now insists, that he is entitled to have the Government exhaust its remedies against the Three-Way Land Company, before demanding the penalty of him, supra. The law permits parties to contract with reference to responsibility imposed by Statutes:

> "There can be no valid agreement to violate a law, *but private, legal obligations, imposed by statute, may be varied by agreement which is not forbidden by law*, or which is not in violation of the spirit of the law."
>
> Westinghouse El. & Mfg. Co. vs Binghamton R. R. Co., 255 Fed., 378, Headnote 9.

And it is the duty of the Government, as Intervenor, to recognize this contract, instead of trying to destroy it, as is very evident in this record.

> "*If one person agrees with another to be primarily liable for a debt, due from that other to a third person, so that as between the parties to the agreement, the first is the principal, and the second the surety*, the creditor of such surety is entitled in equity to be substituted in his place *for the purpose of compelling such principal to pay the debt.*"
>
> Keller vs Ashford, 133 U. S., 610, 623, 33 L. Ed., 667;
> Fish vs. First Natl. Bank, 150 Fed., 524.

VIOLATION OF CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

Every effort was made to protect this right. R. pp. 373, 379, 382, 384, 385, 387, 388, 396 and 403.

This immunity is recognized by both State and Federal Courts.

Section 9777, 1932 Tennessee Code;
Calvert vs. State, 158 Tenn., pp. 542, 543;
Wolfle vs. U. S., supra.

Likewise, it is confidently urged that the manner and means used to obtain and take away from the Petitioners the funds and bonds in question was in open violation of the provisions of Amendment Four to the Constitution, and should be returned.

Weeks vs. U. S., 323 U.S., 383, 58 L. Ed., 652;
U. S. vs. Mattingly, 285 Fed., 922;
U. S. vs. Madden, 297 Fed., 679;
U. S. vs. Lydecker, 275 Fed., 976.

Neither can information thus improperly obtained be used.

Byars vs U. S., 273 U. S., 28, 71 L. Ed., 520;
U. S. vs Slusser, 270 Fed., 818;
U. S. vs. Bush, 269 Fed., 455;
U. S. vs. Costanzo, 13 Fed. (2d) 259.

NO RIGHT TO SUBSTITUTE EXTRAORDINARY FOR REGULAR PROCESS.

Nor can the use of the ordinary processes of law be avoided, or circumvented, by the regular or mandatory orders of the Court.

Weinberg vs. U. S., 126 Fed. (2d) 1004.

FEDERAL COURTS ARE DEPENDENT ON STATE LAWS FOR ATTACHMENT, ETC.

Congress has enacted no attachment, garnishment, discovery or execution laws. But, Respondents are wholly dependent on State Statutes for these processes.

28 U.S.C.A., Sec. 726, 727.

RIGHT OF DISCOVERY

As to discovery, the laws of Tennessee are that a creditor is only entitled to this against the debtor, himself, after judgment and execution.

1932 Tennessee Code, Sec. 10353.
Cresswell vs Smith, 76 Tenn., 688;
Jourolman vs. Massengill, 86 Tenn., 81, 5 S.W., 719;
Adler, et al. vs. Fenton, et al, 65 U.S. 407, 16 L. Ed. 696.

It is, therefore, respectfully submitted that the Petition for Certiorari in this cause should be granted in order that justice may be done.

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